Filed 4/26/13 In re E.V. CA1/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re E.V., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. E.V., Defendant and Appellant.	A135773 (Solano County Super. Ct. No. J40326)

This is an appeal from the juvenile court's jurisdictional order of May 2, 2012 and disposition order of June 7, 2012. Pursuant to these orders, the juvenile court found beyond a reasonable doubt that minor E.V. committed vehicle theft in violation of Vehicle Code section 10851, which is a "wobbler" offense, as well as several misdemeanor offenses. The juvenile court then continued minor as a ward, and placed him on probation with 40 days of custody credits. For reasons set forth below, we remand this matter to the juvenile court to consider and declare whether minor's vehicle theft offense is a felony or misdemeanor. In all other regards, the juvenile court orders are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

On July 26, 2011, a juvenile wardship petition was filed in Santa Clara County pursuant to Welfare and Institutions Code section 602 (section 602 petition), alleging

that, on August 6, 2010, minor committed the felony offense of vehicle theft (count one) (Veh. Code, § 10851, subd. (a)), and the misdemeanor offenses of resisting, delaying or obstructing an officer (count two) (Pen. Code, § 148, subd. (a)(1)), possessing burglary tools (count three) (Pen. Code, § 466), and driving without a license (count four) (Veh. Code, § 12500, subd. (a)).[1]

On January 17, 2012, in a separate case stemming from an earlier section 602 petition, the Solano County Probation Department filed a notice of hearing alleging minor violated the terms of his probation by using marijuana. At the subsequent March 22, 2012 probation violation hearing, minor admitted violating probation by "fail[ing] to abstain from marijuana."

A contested jurisdictional hearing with respect to the allegations in the section 602 petition filed in this case began April 23, 2012, at which the following undisputed evidence was presented.

On August 6, 2010 at about 3:15 a.m., two California Highway Patrol officers saw a Honda Civic at a stop sign with no front license plate. After following the Civic for a few blocks to a cul-de-sac, the officers attempted an enforcement stop by activating their siren and overhead lights and blocking the cul-de-sac opening. However, rather than stopping, the Civic turned around and passed the officers traveling in the opposite direction at a speed of about 50 miles-per-hour, exiting the cul-de-sac in a gap between the squad car and curb. One of the officers, Officer Tesch, who had exited the squad car, was able to get a close look at the driver as the Civic passed by.

The officers returned to their vehicle and turned it around to follow the Civic, finding it a few blocks away, abandoned but still running, despite the absence of an ignition key. The officers did not see any fleeing suspects, but could hear a rattling sound in a nearby yard. Within the hour, other police officers had arrived at the scene to assist in the search. One of these officers detained minor in a nearby back yard about 150 feet from the abandoned Civic. Shortly thereafter, Officer Tesch identified minor as the

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[1] Unless otherwise stated herein, all statutory citations are to the Penal Code.

person he saw driving the Civic in the cul-de-sac. Officer Tesch then read minor his Miranda rights and took him to the police station.

A subsequent search of the Civic revealed a backpack containing various burglary tools, including screwdrivers, wire cutters, a window punch, and an oil dipstick altered to enable it to start a vehicle without a key. When questioned, minor, who had been reported missing by his parents earlier that day after an altercation with his father, admitted the Civic was not his, but claimed not to recall where he got it. Minor explained that, after running away from home, he had gone to a party, although he could not recall its location. Minor declined to answer when asked whether he had been driving the Civic, which DMV records showed belonged to someone named Paul Koehler. Minor was thereafter arrested and transported to juvenile hall.[2]

Following the contested jurisdictional hearing, the juvenile court sustained the allegations that minor committed each of the alleged offenses, and then ordered the case transferred to Solano County. The Solano County Juvenile Court accepted transfer on May 10, 2012.

At the disposition hearing on June 7, 2012, the juvenile court continued minor as a ward of the court, placed him on probation in his parents' custody unless his probation officer were to permit him to live independently, and gave him credit for 40 days served in custody. This timely appeal followed.

DISCUSSION

Minor raises one issue for our review: Did the juvenile court err by failing to exercise its discretion to determine on the record whether his vehicle theft offense, a so-called "wobbler" offense, was a felony or a misdemeanor? For the reasons set forth below, we conclude there was such an error, requiring remand of this matter to the juvenile court for correction.

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[2] Minor stipulated to several facts, including that he was not licensed to drive and that the Civic had been reported stolen by Koehler, the registered owner, on the morning of August 6, 2010.

We begin with the governing legal principles. A "wobbler" offense is one that may be deemed either a felony or misdemeanor offense. It is generally within the trial court's discretion to make this determination. (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1204.) However, when a minor is found to have committed a wobbler offense, the juvenile court has a mandatory duty to declare on the record whether the offense is a misdemeanor or felony. (*Id.* at pp. 1201, 1204; Welf. & Insts. Code § 702 [hereinafter, section 702]; Cal. Rules of Court, rule 5.795(a), rule 5.780(e)(5), rule 5.778(f)(9).)

As the California Supreme Court teaches: "[S]ection 702, in relevant part, provides: 'If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony.' [¶] . . . The language of the provision is unambiguous. It requires an explicit declaration by the juvenile court whether an offense would be a felony or misdemeanor in the case of an adult. . . . [¶] The requirement is obligatory: 'section 702 means what it says and mandates the juvenile court to declare the offense a felony or misdemeanor.' (*In re Kenneth H.* [(1983)] 33 Cal.3d [616,] 619; [citations]." (*In re Manzy W., supra*, 14 Cal.4th at pp. 1203-1204.)[3]

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[3] "*Kenneth H.* addressed the significance of the finding required by Welfare and Institutions Code section 702. 'Most important, the finding determines the maximum period of physical confinement. Under [Welfare and Institutions Code] section 726, a minor removed from the custody of a parent or guardian may not be held for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense which brings the minor within the jurisdiction of the juvenile court. [¶] Further, the potential for prejudice from a finding of felony status has been increased by passage of Proposition 8, which provides that any prior felony conviction, whether adult or juvenile, "shall . . . be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding." ' (*In re Kenneth H., supra*, 33 Cal.3d at p. 619 fn. 3.) As the People concede, it may also have substantial ramifications in future criminal adjudications of the minor, including under . . . the 'Three Strikes' law--which provides that certain prior juvenile adjudications 'shall constitute a prior felony conviction for the purposes of sentence enhancement.' As they assert, 'some of these prior adjudications could include offenses that are "wobblers." ' In addition, of course, ' "[i]t is common knowledge that such an adjudication when based upon a charge of committing an act that amounts to a felony, is a blight upon the character of and is a

Failure to discharge this mandatory duty to declare the juvenile's offense a felony or misdemeanor does not, however, automatically result in remand. Rather, "speaking generally, the record in a given case may show that the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its discretion to determine the felony or misdemeanor nature of a wobbler. In such a case, when remand would be merely redundant, failure to comply with the statute would amount to harmless error." (*In re Manzy W.*, *supra*, 14 Cal.4th at p. 1209.)

In this case, the following facts are relevant to whether minor is correct that remand is necessary based on the juvenile court's failure to discharge its mandatory duty under section 702 to declare his commission of vehicle theft a felony or misdemeanor. First, we note the section 602 petition filed July 26, 2011 alleged minor had committed "THEFT OR UNAUTHORIZED USE OF A VEHICLE, in violation of VEHICLE CODE SECTION 10851(a), a Felony." Following a contested jurisdictional hearing, the Santa Clara County juvenile court agreed, sustaining a finding beyond a reasonable doubt that minor committed "Count 1, the unauthorized use of a vehicle," and describing "Count 1 . . . []as a felony." The juvenile court then set minor's maximum time of confinement at three years and eight months, the confinement period for a felony offense. In rendering these decisions, the juvenile court followed the recommendation set forth in the Santa Clara County Probation Department's report that the court find true the allegation that minor had committed a violation of "Vehicle Code Section 10851(a), a Felony," as well as three misdemeanor violations. Finally, both the minute orders from the jurisdictional hearing and the subsequent disposition report in Santa Clara County indicated the juvenile court had found true beyond a reasonable doubt that minor committed one felony count pursuant to Vehicle Code section 10851, subdivision (a), and three misdemeanor counts pursuant to section 148, subdivision (a)(1), section 466 and Vehicle Code section 12500, subdivision (a).

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serious impediment to the future of such minor." ' [Citation.]" (*In re Manzy*, *supra*, 14 Cal.4th at pp. 1208-1209.)

Minor's case was then transferred to Solano County for disposition. The Solano County Probation Department's report stated that "the minor sustained the following charges on 5/2/12: Count 1: 10851(a) VC, Vehicle Theft, felony." Further, the report recommended minor's maximum term of confinement be set for five years, with the petition deemed a felony as to count one and misdemeanors as to counts two, three and four.

At the June 7, 2012 disposition hearing, the Solano County juvenile court noted the charges sustained against minor in Santa Clara County were "for felony 10851, resisting arrest, petty theft, driving without a license." After acknowledging some positive events in minor's life, including that he was employed and starting a family of his own, the court indicated its belief that minor would successfully complete his term of probation. The court then signed a disposition order indicating count one was "deemed" a felony while the remaining counts were misdemeanors. In doing so, however, the court left blank a section of the pre-printed order where it was directed to indicate *"[t]he court has considered whether Count(s) __ should be a misdemeanor or a felony, and determines that the offense(s) is/are a misdemeanor as to Count(s) __, and a felony as to Count(s) ___, and an infraction as to Count(s) ___.*" (Italics added.)

Having reviewed this record, we conclude it fails to establish the juvenile court was aware of or discharged its mandatory duty pursuant to section 702 to declare minor's commission of the vehicle theft offense a felony or a misdemeanor. While the People correctly note that the juvenile court expressly stated that minor had committed an offense that was a felony in both the jurisdictional and disposition orders, these statements, without more, are insufficient to demonstrate the court's compliance with section 702 because they do not establish the court was aware of its discretion to consider minor's offense a felony *or* a misdemeanor. (See Cal. Rules of Court, rules 5.780(e)(5), 5.778(f)(9) [requiring the court to "consider which description applies and expressly declare on the record that it has made such consideration," and to "state its determination as to whether the offense is a misdemeanor or a felony"].) Nothing in the record indicates that the court was made aware that minor's vehicle theft offense was a wobbler

offense. Neither defense counsel, the prosecution nor the probation department appears to have informed the court of this fact. Moreover, had the juvenile court actually exercised its discretion to consider and decide whether the wobbler in this case was a felony or misdemeanor, as the law required, we conclude the most relevant portion of the record – the space in the disposition order where the court was to indicate that it had in fact done so – would not have been left blank.[4]

Under these circumstances, we agree with minor that this matter must be remanded to the juvenile court to properly exercise its discretion under section 702 to declare that it has considered and determined whether the vehicle theft offense in count one is a felony or misdemeanor.

DISPOSITION

The disposition order is set aside, and the matter is remanded to the juvenile court for further proceedings in compliance with section 702 and California Rules of Court, rules 5.795(a), 5.780(e)(5), and 5.778(f)(9). In all other regards, the juvenile court's orders are affirmed.

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Jenkins, J.

We concur:

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McGuiness, P. J.

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Pollak, J.

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[4] We suspect, given the fact that this matter was transferred for disposition from Santa Clara County to Solano County, that each court may have erroneously believed the other court was going to, or did, make the mandatory declaration. (See Cal. Rules of Court, rule 5.780 (e)(5) ["These determinations [as to whether the offense is a felony or misdemeanor] may be deferred until the disposition hearing"].) In any event, this mistake can easily be rectified on remand.